

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOSEPH PUCKETT,) 1: 05-CV-00447-REC-SMS
Plaintiff,)
v.) REPORT AND RECOMMENDATION TO
JUDGE JONES, et al.,) DISMISS ACTION WITH PREJUDICE FOR
Defendants.) FAILURE TO STATE A CLAIM UPON
) WHICH RELIEF MAY BE GRANTED (DOC.
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Plaintiff, previously a state prisoner at the Fresno County Jail, is now out of custody and is proceeding pro se with an action for damages and other relief concerning alleged civil rights violations. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rules 72-302 and 72-304.

I. Screening the Complaint

The Court must screen complaints brought by prisoners seeking relief against a governmental entity or officer. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the Court determines that an allegation of poverty is untrue or that the action is 1) frivolous or malicious, 2) fails

1 to state a claim upon which relief may be granted, or 3) seeks
2 monetary relief from a defendant who is immune from such relief.
3 28 U.S.C. §§ 1915A(b), 1915(e) (2).

4 In reviewing a complaint under this standard, the Court
5 must accept as true the allegations of the complaint in question,
6 Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738, 740
7 (1976), construe the pro se pleadings liberally in the light most
8 favorable to the Plaintiff, Resnick v. Hayes, 213 F.3d 443, 447
9 (9th Cir. 2000), and resolve all doubts in the Plaintiff's favor,
10 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

11 If the Court determines that the complaint fails to state a
12 claim, leave to amend should be granted to the extent that the
13 deficiencies of the complaint can be cured by amendment. Lopez v.
14 Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc). A
15 complaint, or a portion thereof, should only be dismissed for
16 failure to state a claim upon which relief may be granted if it
17 appears beyond doubt that the Plaintiff can prove no set of
18 facts, consistent with the allegations, in support of the claim
19 or claims that would entitle him to relief. See Hishon v. King &
20 Spalding, 467 U.S. 69, 73 (1984), citing Conley v. Gibson, 355
21 U.S. 41, 45-46 (1957); see also Palmer v. Roosevelt Lake Log
22 Owners' Ass'n., Inc., 651 F.2d 1289, 1294 (9th Cir. 1981).
23 Dismissal of a pro se complaint for failure to state a claim is
24 proper only where it is obvious that the Plaintiff cannot prevail
25 on the facts that he has alleged and that an opportunity to amend
26 would be futile. Lopez v. Smith, 203 F.3d at 1128.

27 Here, Plaintiff filed his initial complaint on April 6,
28 2005. His complaint was dismissed with leave to amend by the

1 Court's order dated May 4, 2005. Plaintiff filed a first amended
2 complaint (FAC) on May 23, 2005.

3 The FAC is substantially a repetition of Plaintiff's
4 original complaint. Plaintiff sues Judge Jones, Attorney Magill
5 (his counsel in 1996), Judge Kapetan, the District Attorney's
6 Office, and the Superior Court judges. He seeks damages and
7 equitable relief. He complains that he was convicted in 1996 of
8 grand theft, apparently in the Superior Court of San Francisco.
9 Subsequently, he entered into a plea bargain in December 2004 in
10 the Fresno Superior Court that included pleading to a strike
11 under California's Three Strikes Law, namely, a robbery with a
12 gun, that did not constitute part of Plaintiff's criminal record.
13 However, a transcript of the proceedings held on December 14,
14 2004, which is appended to the FAC, reveals that Judge Kapetan
15 noted that the prior conviction alleged as a strike was amended
16 to reflect a charge of violating Penal Code § 487(c), which would
17 not be a strike. Further, the transcript reveals that the
18 enhancement was stricken for sentencing purposes, and prison
19 priors were stricken; Plaintiff was found eligible for
20 Proposition 36 probation, imposition of sentence was suspended
21 for two years, and Plaintiff was placed on two years' formal
22 probation. Plaintiff complains that the District Attorney
23 wrongfully, with malice, and in bad faith filed the strike
24 allegation, and that it caused him pain, suffering, and emotional
25 distress. In March 2005 Plaintiff sought to withdraw the guilty
26 plea, which precipitated Judge Kapetan's appointing a public
27 defender, which Plaintiff alleges was a violation of his rights.
28 Plaintiff alleges generally the following:

1 1. The defendants were acting under color of state
2 law. 2. and deprived plaintiff of rights secured by
3 the Constitution of federal statutes sections
4 1985(3) cause of action for damages to argue who is
5 injured by a conspiracy furned (sic) for the purposes
6 of depriving (him) either directly or indirectly
7 or of the equal protection of the laws, of equal
8 privileges and immunities under the laws.

9 (FAC at 4.) No facts are alleged concerning a conspiracy,
10 although Plaintiff states:

11 Now that the damage been done plaintiff has served
12 an unlaw (sic) sentence that happen in 1996, now that
13 over plaitiff (sic) is allegeding (sic) a pervasive
14 pattern of illegal and unconstitutional affirmative
15 links between times of certain incident.

16 (Id.)

17 A. Defendants' Conduct

18 The Civil Rights Act under which this action was filed
19 provides:

20 Every person who, under color of [state law]
21 . . . subjects, or causes to be subjected,
22 any citizen of the United States. . . to the
23 deprivation of any rights, privileges, or
24 immunities secured by the Constitution. . .
25 shall be liable to the party injured in an
26 action at law, suit in equity, or other
27 proper proceeding for redress. 42 U.S.C. §
28 1983.

To state a claim pursuant to § 1983, a plaintiff must plead that
defendants acted under color of state law at the time the act
complained of was committed and that the defendants deprived the
plaintiff of rights, privileges, or immunities secured by the
Constitution or laws of the United States. Gibson v. United
States, 781 F.2d 1334, 1338 (9th Cir. 1986).

Further, the statute plainly requires that there be an
actual connection or link between the actions of the defendants
and the deprivation alleged to have been suffered by plaintiff.

1 See Monell v. Department of Social Services, 436 U.S. 658
2 (1978); Rizzo v. Goode, 423 U.S. 362 (1976). The Ninth Circuit
3 has held that "[a] person 'subjects' another to the deprivation
4 of a constitutional right, within the meaning of section 1983, if
5 he does an affirmative act, participates in another's affirmative
6 acts or omits to perform an act which he is legally required to
7 do that causes the deprivation of which complaint is made."
8 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

9 Here, Plaintiff has failed to link each of the named
10 defendants with some affirmative act or omission that resulted in
11 an alleged deprivation of federally protected rights.

12 B. Judicial Immunity

13 However, Plaintiff appears to allege that Judge Jones's
14 conduct in accepting Plaintiff's plea and sentencing Plaintiff
15 resulted in a violation of Plaintiff's rights. Further, it
16 appears that he is alleging that Judge Kapetan's conduct in
17 appointing a public defender was a violation of his
18 constitutional rights.

19 Absolute judicial immunity from damage actions under 42
20 U.S.C. § 1983 extends to judges for acts performed in their
21 official capacities and to officers whose functions bear a close
22 association to the judicial process. Demoran v. Witt, 781 F.2d
23 155, 156 (9th Cir. 1986); Ashelman v. Pope, 793 F.2d 1072, 1075
24 (9th Cir. 1986). The allegations of the FAC refer to actions on
25 the part of judges that are within the scope of judicial
26 immunity. Although Plaintiff states that the Defendants are sued
27 in their personal capacities as well as their official
28 capacities, all allegations regarding judges relate to their

1 official conduct. Thus, the claims against the judges are barred.

2 C. Prosecutorial Immunity

3 State prosecutors are absolutely immune from civil liability
4 for acts taken in their official capacity that are closely
5 associated with the judicial process, such as initiating
6 prosecution and presenting the state's case. Imbler v. Pachtman,
7 424 U.S. 409, 427, 430-431 (1976); Milstein v. Cooley, 257 F.3d
8 1004, 1008 (9th Cir. 2001).

9 Plaintiff names the District Attorney's office as a
10 defendant, apparently with respect to charging, plea, and
11 sentencing decisions. Such conduct would constitute conduct in
12 the prosecutor's official capacity of prosecuting the case such
13 that absolute immunity attaches. Thus, Plaintiff's claims against
14 the District Attorney's office are barred.

15 D. Invalidation of Plaintiff's Conviction

16 Moreover, when seeking damages for an allegedly
17 unconstitutional conviction or imprisonment, "a § 1983 plaintiff
18 must prove that the conviction or sentence has been reversed on
19 direct appeal, expunged by executive order, declared invalid by a
20 state tribunal authorized to make such determination, or called
21 into question by a federal court's issuance of a writ of habeas
22 corpus, 28 U.S.C. § 2254." Heck v. Humphrey, 512 U.S. 477, 487-88
23 (1994). "A claim for damages bearing that relationship to a
24 conviction or sentence that has not been so invalidated is not
25 cognizable under § 1983." Id. at 488.

26 Plaintiff has not alleged that the underlying conviction or
27 sentence has been reversed or otherwise invalidated by a state
28 tribunal. Accordingly, the claim should be dismissed.

1 E. Defendant Magill

2 To state a claim under section 1983, a plaintiff must plead
3 (1) that the defendant acted under color of state law and (2)
4 that the defendant deprived him of rights secured by the
5 Constitution or federal statutes. Gibson v. United States, 781
6 F.2d 1334, 1338 (9th Cir. 1986). Generally, private parties are
7 not acting under color of state law. See Price v. Hawaii, 939
8 F.2d 702, 707-08 (9th Cir. 1991).

9 Plaintiff names attorney Magill as a defendant. It appears
10 that Magill was acting as a private attorney in defendant
11 Plaintiff in the criminal action. Plaintiff has not alleged facts
12 showing how Defendant Magill was acting under color of state law.

13 Even if Magill was acting as Plaintiff's public defender,
14 Plaintiff nevertheless has failed to allege facts showing how
15 Defendant Magill has acted under color of state law. In order to
16 recover under § 1983, Plaintiff must allege and prove that
17 Defendants acted under color of state law to deprive Plaintiff of
18 a right secured by the Constitution or federal statute. Karim-
19 Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th Cir.
20 1988). It is established that a public defender does not act
21 under color of state law when performing a lawyer's traditional
22 functions as counsel to a defendant in a criminal proceeding.
23 Polk County v. Dodson, 454 U.S. 312, 317, 325 (1981); Rivera v.
24 Green, 775 F.2d 1381, 1384 (9th Cir. 1985).

25 F. Malice

26 In this action, Plaintiff is attempting to relitigate issues
27 determined in prior actions. In Puckett v. Fresno Superior Court,
28 CIV F 03 6161 REC DLB, the Court dismissed Plaintiff's

1 allegations against Judge Jones and attorney Magill on the basis
2 of judicial immunity and absence of actions under color of law.
3 (Findings and Recommendations filed November 6, 2003, adopted on
4 March 25, 2004). In Puckett v. Duncan, CV F 98-5845 OWW HGB P,
5 the Court denied plaintiff's habeas corpus petition, in which
6 Plaintiff challenged his 1996 plea as coerced and the assistance
7 of attorney Magill as ineffective. (Findings and Recommendation
8 dated February 18, 2000, adopted on October 16, 2002.) Thus, it
9 is inferred that to the extent that Plaintiff is seeking to
10 relitigate issues already litigated, Plaintiff's complaint is
11 malicious and should be dismissed.

12 G. Conspiracy

13 In the FAC, Plaintiff appears to mention a claim for relief
14 pursuant to 42 U.S.C. § 1985(3). The second clause of section
15 1985(2) proscribes conspiracies for the purpose of impeding the
16 due course of justice in any state, with the intent to deny equal
17 protection of the laws, and section 1985(3) proscribes
18 conspiracies to deny equal protection of the law or equal
19 privileges and immunities.¹ Coverdell v. Dep't. of Soc. and
20 Health Svcs., State of Washington, 834 F.2d 758, 767 (9th Cir.
21 1987). An allegation of racial or class-based discrimination is
22 required to state a claim for relief under either the second
23 clause of section 1985(2) or section 1985(3). Bretz v. Kelman,
24 773 F.2d 1026, 1028-1030 (9th Cir. 1985). No such allegation or
25 basis for such an allegation appears in either of Plaintiff's
26

27 ¹ "The first clause of 1985(2) concerns conspiracy to obstruct justice in the federal courts, or to intimidate a
28 party, witness or juror in connection therewith" Bretz v. Kelman, 773 F.2d 1026, 1028 n.3 (9th Cir. 1985) and is not
applicable.

1 complaints filed in this action.

2 To the extent that Plaintiff alleges a conspiracy under §
3 1983, Plaintiff must allege some facts with respect to the
4 conspiracy. In the context of conspiracy claims brought pursuant
5 to section 1983, such a complaint must "allege specific facts to
6 support the existence of a conspiracy among the defendants."
7 Buckey v. County of Los Angeles, 968 F.2d 791, 794 (9th Cir.
8 1992); Karim-Panahi v. Los Angeles Police Department, 839 F.2d
9 621, 626 (9th Cir. 1988). Plaintiff must allege that defendants
10 conspired or acted jointly in concert and that some overt act was
11 done in furtherance of the conspiracy. Sykes v. State of
12 California, 497 F.2d 197, 200 (9th Cir. 1974).

13 Plaintiff has not alleged any facts supporting the existence
14 of a conspiracy among defendants. Further, Plaintiff has not
15 alleged facts demonstrating that defendants violated his
16 constitutional rights. In order to state a cognizable claim for
17 relief for conspiracy, Plaintiff must establish that defendants
18 conspired to violate an underlying constitutional right.

19 II. Conclusion

20 In view of the nature of Plaintiff's claims, it does not
21 appear that Plaintiff could allege facts sufficient to state a
22 claim. In its order dismissing the original complaint, the Court
23 notified Plaintiff of all defects except those pertaining to the
24 newly asserted, vague allegations of conspiracy. Plaintiff has
25 had an opportunity to remedy the defects, but Plaintiff has not
26 remedied the defects; the allegations remain essentially the
27 same. There is thus no basis for inferring that it is possible
28 that Plaintiff can remedy the defects outlined hereinabove. It

1 appears that giving Plaintiff another opportunity to amend the
2 complaint would be futile.

3 III. Recommendation

4 Accordingly, it IS RECOMMENDED that

5 1. The complaint BE DISMISSED without leave to amend and
6 with prejudice for failure to state a claim; and

7 2. The Clerk of Court BE DIRECTED to enter judgment for
8 Defendant because the dismissal would terminate the action in its
9 entirety.

10 This report and recommendation is submitted to the United
11 States District Court Judge assigned to the case, pursuant to the
12 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 72-304 of the
13 Local Rules of Practice for the United States District Court,
14 Eastern District of California. Within thirty (30) days after
15 being served with a copy, any party may file written objections
16 with the Court and serve a copy on all parties. Such a document
17 should be captioned "Objections to Magistrate Judge's Findings
18 and Recommendations." Replies to the objections shall be served
19 and filed within ten (10) court days (plus three days if served
20 by mail) after service of the objections. The Court will then
21 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636
22 (b) (1) (C). The parties are advised that failure to file
23 objections within the specified time may waive the right to
24 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
25 1153 (9th Cir. 1991).

26 IT IS SO ORDERED.

27 **Dated: May 26, 2005**
28 icido3

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE